

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
CIVIL ACTION FILE NO. 3:15-CV-354-MOC-DSC**

<b>LM RESTAURANTS, INC.,</b>	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>ALE YEAH!, INC., ALE YEAH!</b>	)	
<b>ROSWELL, INC., FILL 'ER UP,</b>	)	
<b>LLC, FRANCISCO VILA AND</b>	)	
<b>EDDIE HOLLEY,</b>	)	
<b>Defendants.</b>	)	

**MEMORANDUM AND  
RECOMMENDATION**

**THIS MATTER** is before the Court following receipt of a letter from pro se Defendant Fill 'Er Up, LLC which was docketed as a Motion to Dismiss (document #56) on June 6, 2016.

This matter was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1), and this Motion is now ripe for the Court's consideration.

Defendant sent the letter in response to the Court's Order granting Robert S. Bexley and the Bexley Law Firm, LLC's Motion to Withdraw as counsel for Defendants Ale Yeah!, Inc., Ale Yeah! Roswell, Inc., Fill 'Er Up, LLC, Francisco Vila, and Eddie Holley, See Document #52, entered on June 3, 2016. The Court "warn[ed] Defendant Fill 'Er Up, LLC that it must immediately retain substitute counsel..... [citations omitted]. Id. at 1. The Court further "**ORDERED** that Defendant Fill 'Er Up, LLC shall secure replacement counsel, who shall file an entry of appearance within fourteen (14) days of the date of this Order. In the event Defendant does not secure replacement counsel within this period of time, Plaintiff may submit a motion requesting appropriate relief based upon Defendant's failure to retain counsel." Id. at 1-2.

Defendant has not retained substitute counsel. On June 30, 2016, Plaintiff filed its “Motion for Entry of Default” (document #63) which is pending before District Judge Max O. Cogburn, Jr.

Defendant’s letter is addressed “To Whom It May Concern” and states in its entirety:

I am writing this letter regarding the above case. Fill 'Er Up, LLC dba Ale Yeah! Kennesaw is no longer in business. This company closed its doors for the final time in April, 2016, due to major health issues and ordinance issues with the city of Kennesaw, Ga.

We are asking the court to please remove Fill 'Er Up, LLC from any further litigation. We were unknowingly dragged into this lawsuit.

Thank you for your consideration.

Sincerely,

Arthur de Lorenzo & Jeanne Nichols

Document #56.

In its response brief, Plaintiff argues that Defendant Fill 'Er Up, LLC is a proper Defendant in this action. Plaintiff has alleged that Defendant infringed its ALE YEAH! trademark.

For this reason and the other reasons stated in Plaintiff’s brief, the undersigned respectfully recommends that Defendant’s Motion to Dismiss be denied.

### **RECOMMENDATION**

**FOR THE FOREGOING REASONS**, the undersigned respectfully recommends that Defendant Fill 'Er Up, LLC’s “Motion to Dismiss” (document #56) be **DENIED**.

### **NOTICE OF APPEAL RIGHTS**

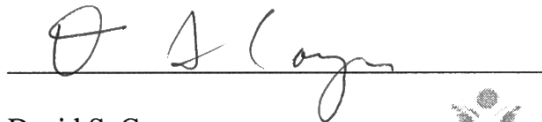
The parties are hereby advised that pursuant to 28 U.S.C. §636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen (14) days after service of same. Failure to file objections to this Memorandum with the District Court constitutes a waiver of the right to de novo review by the District Judge. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005);

Wells v. Shriners Hosp., 109 F.3d 198, 201 (4th Cir. 1997); Snyder v. Ridenour, 889 F.2d 1363, 1365 (4th Cir. 1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140, 147 (1985); Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Wells, 109 F.3d at 201; Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to Defendant Fill 'Er Up, LLC, c/o Arthur De Lorenzo & Jeanne Nichols, 115 Chestnut Drive, Canton, Georgia 30114, to counsel for the remaining parties; and to the Honorable Max O. Cogburn, Jr.

**SO RECOMMENDED AND ORDERED.**

Signed: July 14, 2016

A handwritten signature in black ink, appearing to read "D S Cayer", is written over a horizontal line.

David S. Cayer  
United States Magistrate Judge

